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IN THE

Supreme Court of the United States

October Term, 1957.

No. 930

ERNEST T. WALDIN,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ERNEST T. WALDIN,

Petitioner

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ERNEST T. WALDIN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on February 14, 1958.

OPINIONS BELOW.

The majority and dissenting opinions in the Court of Appeals (Appendix A *infra*, pp. A1-A12, Appendix C, *infra*, pp. A14-A18) have not yet been officially reported. The opinions of the District Courts have been reported in 139 F. Supp. 156 (E. D. Pa. 1951); 138 F. Supp. 791 (E. D. Pa. 1956); 149 F. Supp. 912 (E. D. Pa. 1957).

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, p. A13 *infra*) was entered on February 14, 1958. A timely petition for rehearing was denied on April 9, 1958 (Appendix D, p. A19 *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

Whether, after petitioner was acquitted in 1950 for a 1949 violation of Section 4047(e)(10) of the Internal Revenue Code, the statute of limitations, the doctrine of res judicata, and the Fifth Amendment invalidates a 1955 indictment and sentence of petitioner involving the same 1949 transaction for violating Section 4047(e)(4) of the Internal Revenue Code.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

The constitutional provision and statutes involved are set forth in Appendix E, pp. A20-A22 *infra*.

STATEMENT.

Petitioner, at the time of the acts charged, was a deputy collector for the Bureau of Internal Revenue (App. 146a).* The wrongdoing charged in a series of five indictments was based on an attempt to obtain money from the taxpayer under the pretense of protecting him against a prosecution for income tax evasion. The petitioner had no authority to collect or determine how much tax was due or to prevent any prosecution for income tax evasion.

Petitioner was first indicted, tried and convicted in 1950 on a charge of accepting money illegally in violation of 26 U. S. C. A. § 4047(e)(10). The trial judge thereafter granted a motion for judgment of acquittal. *United States v. Waldin*, 139 F. Supp. 156. The specific ground was that petitioner was not "acting under the authority of any revenue law of the United States." There was then a series of indictments all dismissed and finally a fifth indictment in 1955 for a conspiracy to defraud the United States by "fixing" or pretending to "fix" an income tax case against

* "App." refers to the Appendix filed by petitioner below and there designated Appellant's Appendix. Nine extra copies have been filed.

the taxpayer (App. 3a-8a, 146a). There was no proof produced at the trial that the taxpayer owed any income taxes. (Typewritten transcript, p. 130). During the trial, motions for judgment of acquittal and a point for finding instructions were made and denied (App. 142a, 143a). The case was submitted to the jury on the sole charge that he had violated 26 U. S. C. A. § 4047(e)(4). The jury found the petitioner guilty. The trial judge in his opinion rejected the defense motion that had been made during trial and renewed after the verdict for a judgment of acquittal, on the grounds that the specific ruling upon which the 1950 acquittal had been made was conclusive, saying, ". . . That acquittal, however, does not protect defendant from a conviction in the present case." *United States v. Waldin*, 149 F. Supp. 912, 915.

An appeal was taken from the judgment of conviction and judgment was affirmed, one judge dissenting, (App. A, p. A1, *infra*). A petition for rehearing was filed which *inter alia* raised the point that the statute of limitations had expired. The petitioner had previously raised the question of the statute of limitations in a motion to dismiss the indictment, although the thrust of his argument then was directed against other violations that were included in the indictment. *United States v. Waldin*, 138 F. Supp. 791, 793. A *per curiam* opinion denied the petition for rehearing, with three judges dissenting (App. C, p. A14, *infra*).

REASONS FOR GRANTING THE WRIT.

Important questions of federal criminal law concerning the doctrine of *res judicata*, statute of limitations and due process which are constantly occurring and are present in this case have been decided in a way in conflict with applicable decisions of this Court and present important questions of justice which require review by this Court.

First. *Res Judicata.* Under a long line of cases, it was settled that in criminal cases as well as civil, where

both parties have had their day in court, questions of fact and law distinctly put in issue and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties even if the second suit is for a different cause of action. *United States v. Munsingwear, Inc.*, 340 U. S. 36. Justice Frankfurter, in *Angel v. Bullington*, 330 U. S. 183, 192-3 (1947) stated the reason for this rule as follows: "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion . . . and it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

In this case admittedly what was decided in the 1949 prosecution was that the petitioner was not "acting under the authority of the United States", and he was acquitted. Of course, a prior acquittal of the substantive offense does not ordinarily preclude a prosecution for a conspiracy to commit the same substantive offense, but in this case, where the offenses under Clause (4) and Clause (10) of Section 4047(e) of the Internal Revenue Code of 1939, albeit different crimes, have a common element, namely, that the offender must be an "officer or agent appointed and acting under the authority of any revenue law of the United States" a judicial ruling that the petitioner did not act under authority of any revenue law is conclusive in his favor on the same question concerning the same transaction in the second prosecution—this case.

The significance that an essential element of both offenses had been litigated, and that it was judicially determined that he was not acting under the authority of any revenue law of the United States, was completely ignored by the majority of the court below. The present case was tried on the same facts as the first prosecution and on the same statute, although a different sub-section. The 1955 indictment charged that the petitioner was "an

officer and employee . . . duly appointed and acting under the authority of the Revenue Laws of the United States" (App. 4a) and the trial court submitted the case to the jury in the following language:

> "The defendant here has been indicted under an Act of Congress which reads in part as follows:
>
> > 'Every officer or agent appointed and acting under the authority of any revenue law of the United States who conspires or colludes with any person to defraud the United States shall be fined and shall be imprisoned,'
>
> and so forth. That is, of course, the statute under which the defendant here has been indicted and on which this case has been tried." (Typewritten Transcript p. 217).

The majority members of the court below avoided the *res judicata* problem, treating it as if it were one of double jeopardy[1] by judicially eliminating the requirement from the statute that the offender must be "an officer or agent acting under the authority of any revenue law of the United States" stating, "But we think that the language describ-

1. Justice Holmes in *United States v. Oppenheimer*, 242 U. S. 85, 88, stated: "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." Justice Brandeis, citing *Oppenheimer*, declared: "It is true that the 5th Amendment, in providing against double jeopardy, was not intended to supplant the fundamental principle of res judicata in criminal cases. . . ." *Collins v. Loisel*, 262 U. S. 426, 430. In *Yanow v. United States*, 244 F. 2d 235 (C. A. 5, 1957), the Court there did not treat a *res judicata* problem as if it were one of double jeopardy and held that where a defendant had been acquitted on the substantive charge of unlawful possession of a still, the government could not establish the fact of possession in a subsequent prosecution for conspiracy.

ing conspiracy as forbidden conduct does not require any such qualifications and we do not think we should put it into the statute." (Appendix A, p. A4, *infra*).

Difficult legal questions should not yield to such sweeping-under-the-rug technique. Congress did put these qualifications in the statute and the words mean exactly what they say. The majority interpretation is sheer fiction and is plainly refuted by the literal language. The well known rule that criminal statutes should be interpreted "according to the natural and obvious import of the language without resorting to subtle and forced construction for the purposes of either eliminating or extending its operation" was here disregarded. *United States v. Temple*, 105 U. S. 97, 99.

Tested by the foregoing standards, it is plain that the 1955 prosecution—this case—does violence to the most elementary principles of *res judicata* in criminal cases.

Second. *Statute of Limitations.* Petitioner was convicted of violating § 4047(e)(4) of the Internal Revenue Code of 1939. He had been indicted September 20, 1955 (App. 1a). The indictment charged the petitioner with the violation of § 4047(e)(4), § 145(b) of the Internal Revenue Code of 1939, and § 371 of Title 18 U. S. C. A. (App. 3a-8a). It alleged that the conspiracy commenced on or about April 20, 1949 and continued up to and including October 7, 1949. At the conclusion of the government's evidence, the conspiracy to violate § 371 of Title 18 and § 145(b) of the Internal Revenue Code, was dropped on the government's motion, the government conceding that there was no tax due (Typewritten transcript of testimony p. 130). Petitioner renewed his motion for judgment of acquittal at the conclusion of the entire evidence, which was denied, and submitted the following point for binding instructions, "Under all the law and evidence of this case you must bring in a verdict of not guilty." This point was refused (App. 141a-143a).

The *per curiam* opinion of the court below believed that Sec. 201 of the Miscellaneous Title amended the Internal Revenue Code of 1954 (Appendix C, p. A11, *infra*). But it is Sec. 3748(a) of the Internal Revenue Code of 1939 that is amended (Appendix E, p. A20, *infra*). This Amendment clearly indicates that Congress extended from three to five years the period during which *all violations* of 26 U. S. C. A. Sec. 4047(e)(4) of the Internal Revenue Code of 1939, against which the three year statute had not *yet* run, could be prosecuted, not merely "certain instances," as the *per curiam* opinion of the court below held. The reason for this specific legislation was because Congress was aware that the statute of limitations for offenses by internal revenue agents under the Internal Revenue Code of 1939 was running out. See discussion of debates quoted in *United States v. Kurzenknabe*, 136 F. Supp. 17 (D. C. D. N. J. 1955). For offenses by revenue agents, occurring *after* August 16, 1954, in Sec. 7214(a) of the Internal Revenue Code of 1954 which amended Sec. 4047(e) of the Internal Revenue Code of 1939, the statute of limitations was *at that time* increased to six years by Sec. 6531(7) of the Internal Revenue Code of 1954. See also § 7851 of the Internal Revenue Code of 1954 (Appendix E, p. A22, *infra*).

In *Mertens Law of Federal Income Taxation Code Commentary*, under Sec. 6531, footnote 8, the following pertinent note is made: "The same general three-year limitations period applied under prior law. I. R. C. (1939), Sec. 3748(a). Also under prior law, a six-year period was provided with regard to the offenses described in (1), (2), (3) and (8) above. The remaining offenses fell under the general three-year limitations period in prior law. The House bill (H. R. 8300, 83rd Cong., 2d Sess.) made these changes initially, viz., the six-year limitation period was provided for the willful failure to pay the tax or to make a return; for willfully filing a false or fraudulent return or other document; for corrupt or forcible interference with

the administration of the internal revenue laws; and for certain offenses committed by officers and employees of the United States. The Senate Finance Committee amended the House bill to restore prior law in these areas (see Sen. Rep. No. 1622, 83rd Cong., 2nd Sess. pp. 587-588) but the House provisions were restored in conference. See H. Rep. No. 2543, 83rd Cong., 2nd Sess., p. 79."

It is therefore most difficult to follow the reasoning of the *per curiam* opinion of the court below. Its strained and tortured interpretation is plainly refuted by the literal language and meaning of the Amendment. The words "except that the period of limitation shall be five years for offenses enumerated in Sec. 4047(e) relating to unlawful acts of revenue officers or agents" mean exactly what they say. No other meaning should be squeezed out. The familiar rule that criminal statutes are to be strictly construed is here ignored.

Furthermore, paragraph 1 of Sec. 3748, 26 U. S. C. A., since it concerns statutory crimes, should be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace "so-called frauds not so denominated by the statutes creating offenses". *United States v. Scharton*, 285 U. S. 518, 522. In *Grunewald v. United States*, 353 U. S. 391, this Court reviewed convictions for conspiring to defraud the United States with reference to certain tax matters. One of the counts was brought under 18 U. S. C. § 371. The applicable statute of limitations for that offense was admittedly governed by the three-year statute of limitations at that time. If the *per curiam* opinion of the court below is correct, neither the government nor this Court would have applied the short three-year statute of limitations[2] to an indictment which charged, *inter*

[2] *United States v. Witt*, 215 F. 2d 580, 584 (C. A. 1 1954), decided September 7, 1954 the Court there did state that the statute of limitations applicable under 26 U. S. C. 4047(3)(4) is six years. But the six-year statute of limitations applied to those types of offenses only after August 16, 1954 (Appendix E, p. A22, *infra*). That statement was not necessary for the decision. One of the defendants had

alia: "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws from bribing, unlawful impairment, obstruction, improper dishonesty, fraud and corruption * * *."

Bolich, one of the conspirators in the above case, was also indicted on a second count, charging him with a conspiracy to defraud the United States in violation of 26 U. S. C. A. § 4047(e)(4). The trial court submitted this count to the jury under the following instructions:

> "The second count of the indictment charges a violation of Section 4047(e)(4) of the Internal Revenue Code which makes it a crime specifically for a revenue officer or agent to conspire to collude with any other person to defraud the United States, and provides that any revenue officer or agent who does so shall be punished as provided in that particular section of the statute. In other words, an internal revenue officer or agent who enters into such a conspiracy may be found guilty not alone of a violation of the general statute against criminal conspiracies but also of this particular provision of the Internal Revenue Code. Under this particular section of the statute, it is not necessary that the government prove any overt act. The Statute of Limitations is five years and not three years. The evidence has shown that Bolich, Steinberg and Scherm

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contended that since 26 U. S. C. § 4047(e)(4) related solely to crimes by revenue agents and he had ceased to be a revenue agent, that when the indictment was filed, on April 14, 1953, the three-year statute of limitations, 18 U. S. C. § 3282 had run. The Court held that since he was liable as a private person under 18 U. S. C. § 371, and that he was a party to the conspiracy subsequent to April 14, 1950, the three-year statute of limitations had not run in his favor when the indictment was filed. The Court noted: "As the indictment stated that he ceased to be a revenue agent in 1947, and cited 18 U. S. C. § 371, we think it sufficiently charged him in his capacity as a private person." (footnote omitted).

were internal revenue officers or agents within the meaning of the Internal Revenue Code.

* * *

"In order to return a verdict of guilty as to any defendant named in the second count of the indictment, you must find, beyond a reasonable doubt, that he was an officer or agent of the Bureau of Internal Revenue, and that while acting as such officer or agent, he became a member of the conspiracy to defraud the United States, as alleged in this count of the indictment.

* * *

"The Statute of Limitations on this count is five years; that is, the indictment must have been returned within five years of the commission of the crime. The indictment in this case was returned on October 25, 1954. Therefore, I charge you that to return a verdict of guilty as to any defendant on this count, you must find from the evidence beyond a reasonable doubt, that the defendant was a member of the conspiracy as alleged in this count on and after October 25, 1949, and that he was an official of the Bureau of Internal Revenue at such time." (R 739-741)

The government in the above case never contended that the statute of limitations was six years rather than five.

The *per curiam* opinion further held that the statute of limitations, even if it were a defense, was waived because petitioner raised it for the first time in a petition for rehearing. Three cases were cited in support of this theory. The reliance by the majority of the court below in these cases is surely misplaced. In *Forthoffer v. Swope*, 103 F. 2d 707 (C. A. 9, 1939), the defendant *had pleaded guilty* to the crime charged in the indictment. The Court stated: "A plea of the statute of limitations is a plea in bar; it may be raised by a special plea but, on the other hand, it is also in issue under a plea of not guilty. . . . The defense is available on appeal, but cannot be considered on appeal where not urged in the trial court."

United States v. Franklin, 188 F. 2d 182, 186, 187, (C. A. 7, 1951), concerned a continuing wilful violation of the law, and the Court there stated: "The defendant's failure to register was a continuing wilful violation of the law, and his plea of the statute of limitations has no merit." The Court did remark: "A plea of the statute of limitations is a plea in bar and should be presented to and passed upon by the trial court. *United States v. Kaiser*, 7 Cir., 138 F. 2d 219." But the *Kaiser* case cited as authority involved the affirmative defense of entrapment, which was never raised in the trial court since the defendant there relied upon an alibi.

In *Pruett v. United States*, 3 F. 2d 353, 356, (C. A. 9, 1925), the Court there stated:

> "The embezzlement was conceded and the only other defense available to the plaintiff in error was the defense of statute of limitations. The question was not raised in the court below, at the close of all the testimony, by motion for a directed verdict or otherwise, and the question is therefore not properly before us for review. But, assuming that the defense of statute of limitations is sufficiently favored to justify an appellate court in considering it, where not properly raised below, we do not think that the defense was established in this case as a matter of law."

In the present case the petitioner *did ask for a directed verdict* at the conclusion of the entire evidence, which the trial court refused (App. 141a, 143a). In *United States v. Browne*, 225 F. 2d 751, 755 (C. A. 7, 1955), the Court there stated, in answer to the argument that the defendant had waived venue:[4]

4. There is respectable authority that the defense of the statute of limitations *now* cannot be raised by a motion to dismiss. *United States v. Parrino*, 203 F. 2d 284 (C. A. 2, 1953). Indeed the government relied on this case in opposing a motion to dismiss in *United States v. J. R. Watkins Co.*, 16 F. R. D. 292 (D. C. D. Minn.). The Court there held that the statute of limitations could be raised either

"It appears that the defendant made only a general motion for a directed verdict and the government asserts that proof of venue was waived by failure to specifically designate such failure as a basis for such verdict. Again, United States v. Jones has decided this question adversely to the government's contention. In doing so the court stated, 174 F. 2d at page 748:

> 'The motion for a directed verdict raises the question as to the sufficiency of the evidence to support the verdict of a jury or finding of the court. One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it, there can be no conviction. (Citing cases.)' "

Surely questions of statute of limitations are just as important as venue in criminal cases. In *Wharton's Criminal Evidence* (12th ed.) vol. 1, 64, the following statement is made: "Statutes of limitation in criminal cases are regarded not as statutes of repose as in civil cases, but as creating a bar to the prosecution, and the time within which an offense is committed becomes a jurisdictional fact in all cases subject to limitation." (Footnote citing cases.)

Chief Judge Biggs, writing for the minority in the dissenting opinion, stated, "The view that the charge of the indictment is barred by the statute of limitations is therefore a clearly supportable one.' (Appendix C, p. A18, *infra*). We submit that the dissenting judges were clearly correct.

Third. *Due Process.* If the essence of due process[5] is "fair play," we believe that, five separate successive indictments from year to year, from 1950 to 1955, each a variation on the same theme, in a persistent effort to pun-

before or at the trial of the general issue. In *Askins v. United States*, 251 F. 2d 909 (D. C. Cir. 1958) the Court there held that the statute of limitations could be raised for the first time under 28 U. S. C. § 2255 even to attack a sentence.

5. *Galvan v. Press*, 347 U. S. 522, 550.

ish the petitioner, who was acquitted in 1950, had three indictments dismissed, and after a one-man conspiracy indictment, two-thirds of which at the trial was dropped, and what remained was in essence the 1950 trial, was convicted and sentenced to imprisonment, shockingly violates our traditional concept of fair play. This is double jeopardy doubled.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April, 1958.

APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued November 22, 1957

Before GOODRICH, McLAUGHLIN and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 14, 1958)

By GOODRICH, *Circuit Judge*.

This is an appeal by a defendant who was convicted of violating § 4047(c)(4) of the Internal Revenue Code of 1939. The most important question raised is whether on the facts proved in the case for the government a verdict of guilty under this subsection can be sustained.

The defendant, at the time of the acts charged against him, was a deputy collector for the Bureau of Internal Revenue. His business was to collect unpaid taxes owed by

taxpayers in the zone in Philadelphia to which he was assigned. By virtue of his position he had no authority to compromise or settle claims, nor did he have any authority to have anything to do with the accounts of taxpayers who resided outside his district. The proof adduced by the government against the defendant was that he conspired with persons unknown to induce a taxpayer, named Dr. Mogavero, to pay $20,000 in cash to the defendant and others in order to forestall the prosecution for income tax evasion which the doctor was given to understand was to be brought against him. Dr. Mogavero did not live in the district where defendant operated. It was not shown that either defendant or any of the persons alleged to be involved in the conspiracy had any authority to settle cases, stop prosecutions or furnish other of the alleged protective devices that the doctor was offered. But the evidence presented could lead to the conclusion that an object of the conspiracy was improperly to influence government officials who did have the capacity to do these things, and that at the very least the defendant himself was corrupted as a result of the illegal agreement. There was testimony, also, which the jury could believe, that the conspiracy reached the place where $20,000 in cash was actually put by the doctor into the defendant's hands just before the latter was apprehended.

On these facts may the conviction of the defendant be sustained? Section 4047(e) lists ten "unlawful acts of revenue officers or agents." They differ in description and it is a dangerous generalization to say that the same rules apply to all of them.[1] For instance, clause (1) describes, as a subject for punishment, an agent "who is guilty of any extortion or willful oppression under color of law." Clause (3) penalizes an officer "who willfully neglects to perform any of the duties enjoined on him by law."

Clause (4) is the one here concerned. The opening words of § 4047(e) describe the persons to whom (e) is

1. As was done in United States v. Gerdel, 103 F. Supp. 635 (E. D. Mo. 1952).

applicable. The words are: "Every officer or agent appointed and acting under the authority of any revenue law of the United States . . ." The words of clause (4), with which we are involved here, are: "Who conspires or colludes with any other person to defraud the United States . . ." Then follow other provisions, with the penalty of fine and imprisonment specified in the closing lines of the section.

That a conspiracy to stop prosecution for tax violation and to corrupt government employees is a conspiracy to defraud the United States we think no one would doubt. But can a revenue agent who has no official authority to start or stop a prosecution or, as a matter of fact, to do anything affecting a particular taxpayer's account, violate the section when he does what the jury could have found the defendant did here in concert with strangers totally outside the service? We think that it is enough that a defendant who is in fact a revenue officer shows his own corruption or intent to corrupt the service by participating in an unlawful project which concerns an internal revenue matter.

A similar argument is made that, notwithstanding actual authority, in order to give the phrase "officer or agent appointed or acting under the authority of any revenue law" full effect, it should be interpreted to mean that the agent at least must purport to act as a revenue officer at the time he enters into the conspiracy. To this there are two answers. One is that even without the appellant's gloss the words themselves are not two ways of saying the same thing. A man may be appointed and not be acting either because he has not qualified or because he is away on sick leave or something of the kind. The other answer is that when the Congress meant to require that the revenue officer be acting under purported authority or color of authority it said so as it did in clause (1) which deals with extortion.

The point here involved is not settled by authority. Judge Ganey, when this defendant was prosecuted under clause (10) of the section, thought that under this clause for an agent to be convicted he must have had authority, or at least color of authority, "to compromise, adjust or settle the taxpayer's violation or alleged violation of law." *United States v. Waldin*, 136 F. Supp. 156, 158 (E. D. Pa. 1951). But the conduct described in that particular clause (10) is much more definite and narrow than the conduct proscribed in the clause which we are now considering.

Judge Lord, in an opinion rendered upon a motion to dismiss earlier in these proceedings (138 F. Supp. 791, 795-96 (E. D. Pa. 1956)), thought that the clause involved here was applicable to an agent whether he pretended to act in his capacity as agent or not and whether he made known his authority or purported authority to the taxpayer.

We think Judge Lord was right in holding this particular part of § 4047 applicable to a revenue agent who does the forbidden things. It is quite clear that subsection (e) of 4047 has to do with conduct forbidden to revenue officers and agents. It purports to impose sanctions for a departure from standards of conduct applicable to their offices. It covers quite a number of types of forbidden conduct. When the lawmakers wanted to put the requirement that the person act under color of office in order to commit the offense they said so. In other clauses the very nature of the forbidden conduct would involve a representation at least on the part of the agent that he was acting in his official capacity. This was Judge Ganey's case in the prosecution under clause (10).

But we think that the language describing conspiracy as forbidden conduct does not require any such qualifications and we do not think we should put it into the statute.

The point just discussed was squarely raised by counsel for the defendant in a requested instruction which said:

> "If you find beyond a reasonable doubt that there was in existence a conspiracy and that the defendant was one of the conspirators, you must find that any acts of the defendant were done while he was acting under the authority of his office before you can find the defendant guilty as charged of violation of 26 U. S. C. A. Section 4047(e)(4), and also you must find the defendant entered into the conspiracy while acting under the color of authority of his office."

Judge Grim, who tried the case, denied this request and in denying defendant's motion for a new trial relied upon what Judge Lord had decided in denying the motion to dismiss, 149 F. Supp. 912 (E. D. Pa. 1957).

We agree with Judge Lord and Grim so far as clause (4) is concerned. The view we take makes it immaterial whether Dr. Mogavero believed or did not believe that the defendant was an agent of the department acting within his authority, was an agent of the department acting outside his authority, or was an agent at all. It is sufficient that the defendant was in fact a revenue agent at the time of what the jury found was the misconduct.

The defendant makes a further contention that error was committed when the judge did not strike out evidence relating to the payment of the $20,000. When the defendant was tried under clause (10) before Judge Ganey, the money which was used in the transaction and a list of the serial numbers on the bills were in court and presented in evidence. In the meantime, the money had been returned to Dr. Mogavero and the list of serial numbers on the bills had been lost. Now defendant urges that if the money itself was not produced evidence concerning it should have been refused or stricken out.

At the trial there was testimony from three government agents about this money. They described going to the bank with Dr. Mogavero and getting the money, checking the amounts, making a list of the serial numbers,

wrapping the currency in paper and giving the package to the doctor just a short time before the doctor handed it to the defendant. This testimony, it should be emphasized, came from the very persons who had done all these things with the money.

The only basis on which defendant's motion could be sustained is to allege that there is such a thing as a best evidence rule that requires in every law suit the best possible evidence to prove a given point. There is no such rule and all the modern authorities say so. The confusion got into the law when Baron Gilbert back in 1726 made some incautious statements broad enough to be the basis for misunderstanding of what "the best evidence rule" is. The rule itself is properly confined to writings and is so understood by all the well considered authorities.[2] It may well have been that had the money and the list been produced the testimony might have been stronger, although the jury found it strong enough. There was no error by the trial judge in this.

The defendant also complained of the refusal of the judge to give a requested instruction on entrapment. There are two answers to this objection. One is that any suggestion of entrapment on the evidence is so thin as to be almost fanciful. Another answer is that the instruction was phrased in terms which took the entrapment question out of the hands of the jury on an insufficient basis of fact. There is nothing to the entrapment point.

The judgment of the district court will be affirmed.

HASTIE, *Circuit Judge*, dissenting.

I dissent because, in my view, correct application of the doctrine of res judicata to the circumstances of this prosecution requires that an acquittal be directed.

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2. MCCORMICK, EVIDENCE §§ 195, 196 (1954); 4 WIGMORE, EVIDENCE §§ 1174(1), 1179-85 (3d ed. 1940).

The wrongdoing charged was a scheme to mulct a delinquent taxpayer under pretense of protecting him from governmental action, in the course of which appellant, a deputy collector of the Bureau of Internal Revenue, is said to have solicited and accepted money from the taxpayer. This occurred in 1949. From year to year, from 1950 to 1955, the government obtained a series of five separate indictments in a persistent effort to punish appellant for this misconduct.

Appellant was first indicted, tried and convicted in 1950 on a charge of accepting money to compromise a complaint of violation of law. But, for reasons to be discussed later, the trial judge thereafter granted a defense motion for judgment of acquittal. The same transaction was the basis of a second indictment in 1952 for illegally accepting compensation, and a third indictment of rather similar tenor a year later. These indictments were dismissed in 1953 and 1954. The fourth indictment to be based on this transaction, this time for conspiracy to defeat income taxes, was handed down in 1955. Later in 1955 a fifth indictment initiated the present prosecution for conspiracy to defraud the United States. A jury found the accused guilty as charged. The court then considered and denied a defense motion for judgment of acquittal which urged that the specific ruling upon which the 1950 acquittal had been based was conclusive and required acquittal in this subsequent prosecution.

This brings us to the identification of the specific matter which was so decided in the first prosecution as to require an acquittal, but was relitigated and decided against the accused as an essential element of the crime charged in the present case. That question is, whether, in the 1949 transaction which was the common evidentiary basis of both prosecutions, the accused was "acting under the authority of any revenue law of the United States." It was common to both prosecutions because the successive

indictments were based on clauses (10) and (4), respectively, of the same subsection, § 4047 (e) of the Internal Revenue Code of 1939, which reads as follows:

> "(e) Other unlawful acts of revenue officers or agents. Every officer or agent appointed and acting under the authority of any revenue law of the United States—
>
> . . .
>
> "(4) Who conspires or colludes with any other person to defraud the United States; or
>
> . . .
>
> "(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do—
>
> shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years."

It will be observed that while offenses under clause (4) and clause (10) are different crimes, they, like all other offenses under § 4047 (e), have a common element, namely, the requirement, so stated at the beginning of the subsection as to qualify all of its clauses, that the offender must be an "officer or agent appointed and acting under the authority of any revenue law of the United States." When the existence of this prerequisite status or relationship was challenged on the motion for acquittal after the guilty verdict in the first prosecution, the trial judge wrote an opinion explicitly stating the ground upon which he was directing an acquittal. He said:

"[T]he defendant contends that before an agent of the Bureau of Internal Revenue can be found guilty under Sec. 4047 (e) (10) of the Internal Revenue Code, the government must prove that at the time the agent demanded or accepted the money he must be acting under the authority of the revenue laws. Against the motion, the attorney for the government argues that the agent need not be acting under the authority of law at the critical time in order to convict him. In other words, he maintains that the words: 'and acting under the authority of any revenue law of the United States' in the Code means 'and during his appointment'. We cannot agree. The words of the section are plain. Before an agent can be convicted under it, he must have authority, or at least color of authority, to compromise, adjust or settle the taxpayer's violation or alleged violation of law" *United States v. Waldin*, 1951, 139 F. Supp. 156, 158.

Thus, the accused was acquitted on the specific ground that in the 1949 transaction he was not "acting under the authority of any revenue law of the United States."

Six years later, when the same factual picture of this individual's role and status in that transaction was shown as an essential part of the government's case in the present prosecution, the accused urged the earlier ruling in his favor on the same point as a ground for acquittal. The court, a different judge sitting, again considered the matter on its merits and, disagreeing with the earlier ruling, sanctioned a conviction. The court said:

"In a previous case in this court defendant was charged with and convicted of a violation of subsection (10) of 26 U. S. C. A. former Sec. 4047 in accepting illegally the $20,000 which apparently the jury in the present case also found that he accepted. The trial judge in the previous case granted judgment of ac-

quittal, U. S. v. Waldin, E. C. E. D. 1951, 139 F. Supp. 156. That acquittal, however, does not protect defendant from a conviction in the present case. In the present case defendant is charged with a conspiracy rather than a substantive crime and an acquittal on a charge of a substantive crime does not preclude a prosecution of a conspiracy to commit the same substantive crime." *United States v. Waldin*, 1957, 149 F. Supp. 912, 915.

The quoted language also seems essentially the position of the majority on this appeal. Its error, as I see it, is in treating a *res judicata* problem as if it were one of double jeopardy. The fact that the two contradictory rulings of the district court were made in prosecutions for different offenses, albeit based upon the same transaction, has force in preventing the second conviction from offending the constitutional guarantee against twice being put in jeopardy for the same offense. But the reach of *res judicata* in criminal cases is greater. Even though the successive prosecutions be for different crimes, a ruling favorable to the accused on the facts or the legal significance of a particular transaction in the one prosecution is conclusive in his favor on the same question concerning the same transaction in the second prosecution. See 2 FREEMAN, JUDGMENTS, 5th ed. 1925, § 648; DANGEL, CRIMINAL LAW, 1951, § 187; Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 1954, 39 IOWA L. REV. 317.

The courts have repeatedly stated this doctrine of *res judicata* in criminal cases. There is the plain statement in *Frank v. Mangum*, 1915, 237 U. S. 309, 334, that, in criminal cases as well as civil, "a question of fact or law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties." So, a ruling, whether right or wrong, that a particular short statute of limitations has barred

prosecution for certain misconduct, is *res judicata*. *United States v. Oppenheimer*, 1916, 242 U. S. 85. True, the well known recent application of *res judicata* to a prosecution in *Sealfon v. United States*, 1948, 332 U. S. 575, involved an issue of fact. But the burden of the opinion is that *res judicata* applies to any issue actually decided, without any suggestion that it matters whether the litigants have contested a law point or a matter of evidence. So too, in this circuit, I understand the announced and considered rule to be broadly against the relitigation in a second prosecution of issues or matters of whatever sort actually decided in favor of the accused in an earlier prosecution. *United States v. De Angelo*, 3d Cir. 1943, 138 F. 2d 466; *United States v. McConnell*, E. D. Pa. 1926, 10 F. 2d 977.

The prosecution, recognizing that it is in difficulty on this score, urges in its brief that so much of the judicially stated and repeatedly restated rule as applies to adjudication which has turned on a point of law is dictum in the cases and, therefore, that we should treat this question as one of first impression.[1] Of course, what is ordinarily called a ruling of law on an issue of criminal liability is not a pronouncement of doctrine at large, but a decision as to the legal significance of what happened on a given occasion.

1. This is what the government argues:

"The government concedes that it is unquestionably the law that the prosecution may be prohibited by the doctrine of *res judicata* from proving facts which were conclusively determined adversely to the prosecution by the verdict of the jury in a previous trial for a different offense arising out of the same transaction. We are not prepared, however, to admit that the same rule is applicable with respect to questions of law decided by the Court in an earlier proceeding. We are familiar with dicta in a long line of cases beginning with *Frank v. Mangum, supra*, which say that *res judicata* is applicable to questions of fact and law in criminal cases. However, we have been unable to find one case in which the doctrine was the basis for a Holding establishing conclusiveness of a decision on a legal issue by the Court in a previous trial for a different offense. We therefore respectfully submit that the question is one of first impression and should be treated as such by this Court." Appellee's Brief, pp. 24-25.

And whether the actual dispute concerns the operative facts or the legal rule applicable to them, or both, *res judicata*, if applicable at all, comprehends the particular matter decided; in this case that the accused did not act under authority of any revenue law in the 1949 transaction. It does not matter whether the controversial factor which determined this ruling was the court's evaluation of the evidence or its interpretation of the controlling language of the statute. The important thing is that the court ruled that an essential element of the crime, as stated in the statute, had not been established. The existence of that same element of criminality may not later be proved against the accused to subject him to liability for another offense charged on the basis of the same transaction.

We should not be distressed that this rule may occasionally, perhaps this time, permit a wrongdoer to escape punishment. For it is the deliberate choice of our open society to forego easy and sure convictions of crime—such as the police state can guarantee—in order that the never absent risk of unduly harassing or otherwise oppressive action by government may be minimized. We should rather be concerned that judges not relax the procedural safeguards of our system whatever the record may suggest as to the demerits of the accused.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, McLAUGHLIN and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated:

February 14, 1958.

APPENDIX C.

Opinions Below Sur Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,
Appellant.

SUR PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 9, 1958)

PER CURIAM

In a petition for rehearing the defendant raises for the first time the point that the statute of limitations bars this prosecution. There is good authority which holds that this objection comes too late when presented at this stage. *Forthoffer v. Swope*, 103 F. 2d 707 (9th Cir. 1939); *Pruett v.*

United States, 3 F. 2d 353 (9th Cir. 1925); *cf. United States v. Franklin*, 188 F. 2d 182 (7th Cir. 1951).

Regardless of timeliness, however, we think the contention has no merit. 26 U. S. C. A. § 3748 provides:

> "(a) CRIMINAL PROSECUTIONS. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> "(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,"

Paragraph (1) covers the charge here involved as the opinion of the court, filed February 14, 1958, shows.

In accord with our conclusion is *United States v. Witt*, 215 F. 2d 580 (2d Cir. 1954), which the defendant believes to be wrong but which we think is right. *Grunewald v. United States*, 353 U. S. 391 (1957), cited to us, was a prosecution under 18 U. S. C. § 371, and is not in point here.

The final question is whether § 201 of the Miscellaneous Title to the Internal Revenue Code of 1954, 68A STAT. 929 decreased the period applicable to violations of 26 U. S. C. A. § 4047(c)(4) from six to five years. We think not. We agree with the Government that the purpose was to increase the period of limitations from three to five years in certain instances, but not to decrease the limit as to those offenses which were already covered by the six-year limitation period. This is borne out by such legislative history as there is upon the point. See 100 CONG. REC. 9490-92, 12532-34 (1954); H. R. REP. No. 2543, at 86, 3 U. S. CONG. & ADM. NEWS, 83d Cong., 2d Sess. 5438 (1954).

The petition for rehearing is hereby denied.

BIGGS, *Chief Judge*, dissenting.

The indictment charged the defendant-appellant with a conspiracy to violate Section 4047(e)(4), Title 26, U. S. C. A.[1] It was alleged that the conspiracy continued with the defendant-appellant as a party thereto up to and including October 7, 1949. The indictment was returned on September 20, 1955; therefore more than five and one-half years elapsed between the commission of the offense and the return of the indictment.

Section 3748,[2] 26 U. S. C. A. was amended on August 16, 1954 by Section 201(a), 68 A. Stat. 929, to read as follows:

> "(a) Criminal Prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, *except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents)* and except that the period of limitation shall be six years— [Emphasis added.]
>
> "(1) for offenses involving the defrauding or attempting to defraud the United States or any

1. The indictment also charged the defendant-appellant with other violations but these charges were not pressed and the court below restricted its charge to the conspiracy to violate Section 4047(e)(4), Title 26, U. S. C. A. This court is concerned therefore with the charge of the indictment last designated.

2. The section as originally enacted and quoted in the *per curiam* opinion was:

> "(a) Criminal Prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> "(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner."

agency thereof, whether by conspiracy or not, and in any manner,

. . . .

"(b) Scope of Limitations. Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932."

The *per curiam* opinion of this court concludes that the purpose of this amending section was to increase the period of limitations for those Section 4047(e) violations which had a three year period to five years, but was not intended to decrease the six year limitation period applicable to Section 4047(e)(4) violations to five years. The language of the Section as amended states, however, that the period of limitations shall be five years for Section 4047(e) violations, which include, of course, Section 4047(e)(4) violations. The face of the statute is unambiguous. The conclusion is that the applicable period of limitations should be deemed to be five years in the case at bar. Caminetti v. United States, 242 U. S. 470, 485 (1916); United States v. Mock, 143 F. Supp. 661, 664 (N. D. Cal. 1956).

The *per curiam* opinion, however, goes one step further and concludes that even if the applicable statute of limitations were five years, a defense based on the statute of limitations was waived by the defendant-appellant because he failed to plead or assert it specifically in bar. But statutes of limitations applicable to criminal offenses differ from statutes of limitations in civil actions. In civil actions statutes of limitations are deemed to be mere statutes of repose. In criminal actions statutes of limitations bar prosecution. Wharton, Criminal Evidence § 21; Dangel, Criminal Law § 107. It follows that the protection afforded by a criminal statute of limitations goes to the defendant's liability as a matter of substantive law. United States v. Oppenheimer, 242 U. S. 85 (1916); Hassel v. Mathues, 27 F. 2d 137 (E. D. Pa. 1928). The burden of proving affirma-

tively that the crime was committed within a period not proscribed by the applicable statute of limitations is on the United States. Az Din v. United States, 232 F. 2d 283, 287 (9 Cir. 1956); United States v. Schneiderman, 106 F. Supp. 892 (S. D. Cal. 1952). Accordingly, the authorities are clear that the statute of limitations need not be specifically pleaded, but is put in issue, in criminal cases, by a plea of not guilty. United States v. Brown, Case No. 14,665, 24 Fed. Cases page 1263; United States v. White, Fed. Case No. 16,676, 28 Fed. Cases page 562; United States v. Cook, 84 U. S. 168 (1813); Forthoffer v. Swope, 103 F. 2d 707 (9 Cir. 1939); Housel and Walker, Defending and Prosecuting Federal Criminal Cases § 348. These authorities are applicable since the defendant-appellant entered a plea of not guilty on January 6, 1956. The view that the charge of the indictment is barred by the statute of limitations is therefore a clearly supportable one.

As to the issue of *res judicata*, a most important one, the views stated in Judge Hastie's dissent to the original opinion of this court filed February 14, 1958, seem unanswerable.

For the foregoing reasons I am of the opinion that the case should be reheard before the court en banc.

I am authorized to state that Judge Kalodner and Judge Hastie join in this dissent.

APPENDIX D.

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,
Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge;* and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest: IDA O. CRESKOFF,
Clerk.

Dated: April 9, 1958.

APPENDIX E.

Constitutional Provision and Statutes Involved.

The Constitution of the United States, Amendment V, provides, in pertinent part:

No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty or property without due process of law . . .

Internal Revenue Code of 1939:

> Sec. 3748. Periods of Limitations.
>
> (a) Criminal Prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,
>
> • • •
>
> (26 U. S. C. 1952 ed., Sec. 3748.)

Extension of Limitations on Prosecutions of Offenses by Revenue Officers or Agents.

Act of Aug. 16, 1954, C. 736, § 201, 68A Stat. 929.

Sec. 201. (a) Section 3748(a) of the Internal Revenue Code of 1939 (relating to periods of limitations applicable to criminal prosecutions) is amended by inserting after "within three years next after the commission of the of-

fense," the following: "except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and".

(b) The amendment made by this section shall be effective with respect to offenses committed on or before the date of enactment of this Act, if on such date prosecution therefor is not barred by provisions of law in effect before such date.

(26 U. S. C. A. Internal Revenue Acts Beginning 1946, Cumulative Supplement.)

SEC. 4047. PENALTIES.

* * *

(e) Other unlawful acts of revenue officers or agents. Every officer or agent appointed and acting under the authority of any revenue law of the United States—

. . .

(4) Who conspires or colludes with any other person to defraud the United States; or

. . .

(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do—

shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years.

(26 U. S. C. 1952 ed., Sec. 4047.)

INTERNAL REVENUE CODE OF 1954.

Sec. 6531. PERIODS OF LIMITATION OF CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

• • •

(7) for offenses described in section 7214(a) committed by officers and employees of the United States;

• • •

(26 U. S. C. 1952 ed., Supp. II, Sec. 653.)

Sec. 7851. Applicability of Revenue Laws.

(d) PERIODS OF LIMITATION.—All periods of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, hereby repealed shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed, prior to said repeal, may be commenced and prosecuted within the same time as if this title had not been enacted.

(26 U. S. C. 1952 ed., Supp. II, Sec. 7203.)